SUPREME COURT, U.S.
FILED
APR 4 1994
OFFICE OF THE CLERK

No. 93-1030

In the Supreme Court of the United States

OCTOBER TERM, 1993

CLYDE E. L. MANSFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JEFFERY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Major, USAF

Appellate Government Counsel
Government Trial and
Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20332-5113

QUESTION PRESENTED

Whether petitioner waived his attorney-client privilege by introducing expert testimony that relied on and referred to a personal statement prepared by petitioner for purposes of planning his defense.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Simmons v. *United States*, 390 U.S. 377 (1968)	6
United States v. *Frederick*, 3 M.J. 230 (C.M.A. 1977)	6
United States v. *Nobles*, 422 U.S. 225 (1975)	5
United States v. *Tharpe*, 38 M.J. 8 (C.M.A. 1993)	5
Wallace v. *United States*, 360 F.2d 939 (5th Cir.), cert. denied, 385 U.S. 977 (1966)	6

Constitution, statute and rules:

U.S. Const., Amend. IV	6
Uniform Code of Military Justice, Art. 118(1), 10 U.S.C. 918(1)	2
Mil. R. Evid.:	
Rule 705	6
Rule 801(d)(2)	6

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1030

CLYDE E. L. MANSFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 38 M.J. 415 (1993). The initial opinion of the Air Force Court of Military Review (Pet. App. 11a-25a) is reported at 24 M.J. 611 (1987). The opinion of the Air Force Court of Military Review (Pet. App. 25a-94a) on rehearing is reported at 33 M.J. 972 (1991).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1993. The petition for a writ of certiorari was filed on December 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court martial, petitioner was convicted of premeditated murder, in violation of Article 118(1) of the Uniform Code of Military Justice, 10 U.S.C. 918(1). He was sentenced to life in prison, a dishonorable discharge, total forfeiture of all pay and allowances, and a reduction in grade. The Air Force Court of Military Review vacated petitioner's conviction on the ground that he had been denied effective assistance of counsel. Petitioner was convicted on retrial and sentenced to life in prison, a dishonorable discharge, total forfeiture of all pay and allowances, and a reduction in grade. The Air Force Court of Military Review and the Court of Military Appeals affirmed.

1. On February 4, 1984, Yang Chae-Song was found stabbed to death near Osan Air Base in Korea. Petitioner, a service member stationed at Hawes Air Force Station in California, had been romantically involved with Yang's former wife, Un-Cha. Yang had custody of Un-Cha's and his children. Petitioner went to Korea to convince Yang to allow the children to come to the United States. After arranging a meeting with Yang on false pretenses, petitioner fatally stabbed Yang. Pet. App. 25a-31a.

In April 1984, petitioner was arrested in California. Petitioner underwent a psychiatric evaluation before a sanity board, after which his attorneys decided to try to develop an insanity defense. Defense counsel arranged for several different psychiatrists to interview petitioner. In the course of trial preparation, petitioner's attorneys asked petitioner to recount events leading up to Yang's death. In the first version of petitioner's written statement, he indicated that he had hired a "hit man" to kill Yang, and he described the purchase of the murder

weapon and the way he had used it. Although a version omitting some of the information was prepared for the psychiatrists, two of the psychiatrists, Drs. Vosburg and Coburn, learned of the "hit man" aspect of petitioner's story. After defense counsel discovered that Dr. Coburn had referred to a "hit man" in his notes, petitioner's attorneys decided to abandon the insanity defense, because they feared that disclosure of those references could undermine petitioner's chance of acquittal.[1] Pet. App. 13a-18a.

2. Petitioner appealed his conviction on the ground that his attorneys had rendered ineffective assistance of counsel by not presenting an insanity defense. The Air Force Court of Military Review ordered an evidentiary hearing on that claim. During the hearing, the military judge ordered petitioner's counsel to produce both versions of the personal statement prepared in connection with his trial. Based on the military judge's findings, the Court of Military Review vacated petitioner's conviction. Pet. App. 4a-5a, 19a-24a.

3. At the second court martial, petitioner introduced the testimony of expert witnesses in support of the defenses of lack of mental responsibility and reduced mental responsibility. Pet. App. 5a-6a, 32a-34a. The defense used petitioner's long personal statement that he had written in preparation for his first trial during its examination of petitioner's expert witnesses. All of the expert witnesses except Dr. Vosburg had relied on that statement in arriving at a diagnosis. Over petitioner's objection, the government introduced petitioner's statement into evidence and cross-examined petitioner's ex-

[1] Petitioner's counsel also decided that Dr. Vosburg, who was not a forensic psychiatrist, would be a weak witness. Pet. App. 17a.

pert witnesses based on the statement. *Id.* at 7a n.4, 8a, 35a.

On appeal, petitioner argued that the prosecution should have been barred from relying on any evidence derived from the ineffective-assistance-of-counsel hearing. A divided panel of the Air Force Court of Military Review held that petitioner had waived any attorney-client privilege with respect to matters relating to his ineffective-assistance-of-counsel claim. The court also found that because petitioner's attorneys had based a large portion of their direct examination of petitioner's experts on the information found in petitioner's personal statement, the members of the court martial were entitled to consider the entire statement. Pet. App. 39a-44a.

4. The Court of Military Appeals affirmed. Pet. App. 1a-9a. The court rejected petitioner's claim that his incriminating statement was improperly introduced into evidence. The court noted that, in presenting his mental responsibility defenses at the second trial, petitioner "call[ed] expert witnesses, armed with his incriminating statement, to testify about his mental condition at the time of the killing." *Id.* at 6a.[2] The court held that when an expert witness testifies using a privileged statement as the basis for formulating his opinion, the attorney-client privilege "terminates with respect to those matters placed in issue by the expert's testimony." *Id.* at 7a-8a. The court reserved the question whether petitioner's statement would have remained privileged if he had introduced it solely to support his earlier claim that he had been denied the effective assistance of counsel in

[2] The court accepted the finding of the Court of Military Review that it was "clear that defense experts used [petitioner's] statement in reaching a diagnosis." Pet. App. 7a n.4.

his first trial, but had not affirmatively used it to support his mental responsibility defense on retrial. *Id.* at 7a n.4.

ARGUMENT

Petitioner argues (Pet. 10-22) that his personal statement prepared for his attorneys in connection with his first trial was not admissible at his second trial because it was protected by the attorney-client privilege.[3] The Court of Military Appeals correctly held, however, that petitioner waived his attorney-client privilege on retrial by providing his expert witnesses with the statement and by using it in eliciting their testimony.

Each defense expert at petitioner's second trial adverted to the statement during direct examination, and the courts below found that petitioner's experts relied on the statment in reaching a diagnosis. Pet. App. 6a-7a nn. 2 & 4. As the Court of Military Review explained, "when such experts are called as a witness on behalf of the accused and the witness has relied upon statements of the accused in formulating an opinion, the attorney-client privilege terminates with respect to those matters placed in issue by the expert's testimony." *Id.* at 7a-8a (footnote omitted). That conclusion is consistent with this Court's recognition that a defendant waives his evidentiary privilege with respect to matters covered in and reasonably related to material he introduces. See *United States* v. *Nobles*, 422 U.S. 225, 239-240 (1975); see also *id.* at 239 n.14 (when counsel "attempts to make a testimonial use" of matters otherwise covered by work-product privilege, "normal rules of evidence come into play with respect to cross-examination and production of

[3] Statements provided to defense experts in preparation for trial are presumptively within the protection of the attorney-client privilege. *United States* v. *Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993).

documents"). By eliciting the testimony of defense experts based on and referring to his personal statement, petitioner waived any claim to prevent the factfinder from considering the entire statement. See, *e.g.*, *United States* v. *Frederick*, 3 M.J. 230, 234 (C.M.A. 1977); *Wallace* v. *United States*, 360 F.2d 939, 939 (5th Cir.) (per curiam), cert. denied, 385 U.S. 977 (1966).[4]

Petitioner argues (Pet. 14-16) that he was in fact impermissibly penalized for asserting a claim of ineffective assistance of counsel in connection with his first trial. Relying on *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), which holds that a defendant's testimony at his Fourth Amendment supression hearing may not be used against him at trial, petitioner contends that the introduction of his personal statement at the hearing on his ineffective-assistance-of-counsel claim should not have resulted in a waiver of his attorney-client privilege with respect to material in that statement. This case, however, presents no occasion to decide that question. The Court of Military Appeals held that petitioner waived his attorney-client privilege with respect to the statement not by presenting it at the ineffectiveness hearing, but by introducing expert testimony relying on his personal statement at the second trial. Pet. App. 6a-7a. The court thus expressly reserved the question whether petitioner's attack on his attorneys' competence in the first trial waived his attorney-client privilege as

[4] Once the privilege was waived, the personal statement was admissible. An expert who offers a testimonial opinion can be required "to disclose the underlying facts or data on cross-examination." Mil. R. Evid. 705. In addition, the personal statement was admissible as the admission of a party opponent. Mil. R. Evid. 801(d)(2).

to those matters introduced in connection with his ineffective-assistance-of-counsel claim. *Id.* at 7a n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JEFFERY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Major, USAF

Appellate Government Counsel
Government Trial and
Appellate Counsel Division
Air Force Legal Services Agency

APRIL 1994